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IN THE

Supreme Court of the United States

October Term, 1967.

No. 28.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Admr. of the Estate of JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, Deceased,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

Petitioner,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, Admr. of the Estate of DONALD CIONCI, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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LUMBERMANS MUTUAL CASUALTY COMPANY

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GEORGE W. PATTERSON, ADMR. OF THE ESTATE OF DONALD CIONCI, DECEASED,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 218 F. Supp. 802 (R. 186). The opinion of the Court of Appeals for the Third Circuit is reported at 365 F. 2d 802 (R. 223).

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on August 30, 1966 (R. 271). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. When an automobile owned by the named insured in an automobile liability insurance policy is lent to an operator, who is killed in a car collision causing additional deaths and serious injury and the insurer refused coverage to operator's estate as defendant in multi-party suits, both in state and federal courts, in which the insurer was not a party and the issues different, was not a declaratory judgment action against the insurer to determine coverage under the permissive use clause, in which all the victims were joined as plaintiffs, within the sound discretion of the trial judge?

2. Under the above circumstances, where the named insured is one of the defendants in the state court actions grounded on tenuous vicarious liability, did not the appellate court err in finding the named insured an indispensable party and dismissing the action under Rule 12(b) and refusing the pragmatic application of Federal Rules of Civil Procedure Rule 19, prior to and subsequent to its amendment, as beyond the rulemaking power of this Court?

STATUTES AND RULES INVOLVED.

The statutory provisions and rules involved are: Federal Declaratory Judgment Act, Act of June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349, 28 U. S. C. 2201 and Federal Rules of Civil Procedure 19. They are set forth in Appendix C hereto.

STATEMENT OF THE CASE.

This cause of action arose out of an accident which occurred on January 17, 1958, in which an automobile owned by Edward S. Dutcher was being operated by Donald C. Cionci and in which John R. Lynch and John L. Harris were passengers.

The automobile operated by Cionci, travelling at high speed, crossed the median strip and struck a vehicle being operated by Thomas W. Smith. As a result of the accident, John R. Lynch, Thomas W. Smith and Donald C. Cionci were killed. John L. Harris was severely injured (R. 65, R. 68).

A damage action was brought in the United States District Court by Provident Tradesmens Bank and Trust Company as administrator of the estate of John R. Lynch, deceased, against George W. Patterson as administrator of the estate of Donald C. Cioni, deceased, and entitled Civil Action No. 25149 (R. 11). The estate of Donald Cionci was insolvent and a copy of the complaint was forwarded to Lumbermens Mutual Casualty Company (sometimes called the insurer), who had issued a policy of automobile liability insurance to Edward S. Dutcher (sometimes called the named insured), as owner of the aforementioned vehicle (R. 18-19). Upon Lumbermens' refusal to defend, a default judgment was subsequently entered and the matter was listed for assessment of damages.

Thereafter, the instant case was brought as a civil action calling for a declaratory judgment by Provident Tradesmens Bank and Trust Company as administrator of the estate of John R. Lynch, deceased for the purpose of determining whether or not Cionci was an assured under the permissive use clause of the insurance policy issued to Dutcher by Lumbermens Mutual Casualty Company (R. 25).

On November 29, 1960, upon motions of Lumbermens Mutual Casualty Company, the court entered an order

joining John L. Harris and the administratrix of the estate of Thomas W. Smith as party plaintiffs (R. 26). No request was made to join the owner Dutcher as either a party plaintiff or a party defendant to the declaratory judgment action.

There was at that time pending in the Court of Common Pleas of Delaware County, Pennsylvania, an action brought by Sarah B. Smith, as administratrix of the estate of Thomas W. Smith against Edward S. Dutcher, the estate of John R. Lynch [1] and the estate of Donald C. Cionci. Similarly, an action was brought by John L. Harris in the Court of Common Pleas in Delaware County against the same three defendants (R. 35).

Prior to the trial of the instant case, the administrator of the Cionci estate, after notice to Lumbermens Mutual Casualty Company, settled the claim of Provident Tradesmens Bank and Trust Company for Fifty Thousand Dollars ($50,000.00) and forwarded a judgment note in that amount. This settlement, after notice to Lumbermens Mutual Casualty Company and their attendance, and argument therein, was approved by the Court, Van Dusen, J., on November 20, 1962 (R. 218-219).

The declaratory judgment action was tried before the Honorable Alfred L. Luongo on December 13, 1962. During the trial, the Court heard extended argument as to the competency of Dutcher, the only surviving witness to the transaction in which the keys of the car were given to Cionci. During this argument, counsel for Provident Tradesmens Bank and Trust Company argued that the contingent interest of Dutcher in the Delaware County suits rendered him incompetent to testify under the Penn-

1. While the actions were brought against the estate of John R. Lynch, the party therein is not the same party as that of the plaintiff in the instant case, inasmuch as the administrator of the estate of John R. Lynch in that case being the nominee of the plaintiff was Wilbert M. Massey. Under Pennsylvania law the identity of the party is determined by the personal representative.

sylvania Deadman's Statute[2] as to the estates of the decedents, but competent to testify as to Harris (R. 112, R. 113). Counsel for Lumbermens Mutual Casualty Company argued that the interest of Dutcher was so remote that the Pennsylvania Deadman's Statute should not apply (R. 112). The court upheld Dutcher's incompetency to testify under Pennsylvania Deadman's Statute as to the estates of the decedents. Dutcher's testimony in the trial as to Harris indicated that the keys to the car had been given to Cionci with geographical limitations, which would have been exceeded if Dutcher's testimony were credible (R. 148). Inasmuch as the other parties to the transaction were dead, no additional light could be shed upon the transaction.

Dutcher's demeanor and testimony was found not credible by the jury who rendered a verdict that Cionci was driving Dutcher's vehicle within the orbit of consent given to Cionci by Dutcher (R. 180). Directed verdicts on behalf of the estates of the decedents were similarly entered (R. 163-164).

At no time during the trial did Lumbermens Mutual Casualty Company raise the issue that Dutcher was an indispensable party. Timely motions were filed by Lumbermens for judgment n.o.v. and new trial, which after argument, were denied (R. 197).

The Court entered an order that Donald Cionci was the operator of Dutcher's motor vehicle at the time of the accident and was an assured under the permissive use clause of Dutcher's insurance policy (R. 198). The Court refused a form of judgment that would have required immediate execution of the judgment of Lumbermens Mutual Casualty Company against the estate of Cionci (R. 199). Appeal was taken from such refusal by Lumbermens Mutual Casualty Company, but this appeal was ultimately abandoned. The matter was first argued before a panel

2. Act of May 23, 1887, P. L. 158, § 5(e), 28 Purdon's Pa. Stat. Annot. § 332.

of the Court of Appeals for the Third Circuit on October 6, 1964, without decision. After eighteen months it was ordered for reargument on June 9, 1966 (R. 221).

The majority of the Court found that Dutcher was an indispensable party and therefore the trial court was without jurisdiction. They also found that the trial court abused its discretion in entertaining the declaratory judgment action. It found further that the concept of indispensable party was substantive in nature and insulated from the rulemaking power of this court. It rejected the proposed clarification of the Rule 19 in the light of the advisory committee's note accompanying that rule.

The minority of the court in its dissent believed that the action should not have been dismissed under either former Rule 19 or amended Rule 19 and that the entertainment of the declaratory judgment action was within the sound discretion of the court. It denied that the concept was one of substantive law and strongly defended the power of this court to set forth pragmatic criteria for the guidance of the lower courts.

ARGUMENT.

The issues in the instant case are relatively narrow despite the tangled factual skein. A threshold decision as to the discretion of the lower court to entertain a declaratory judgment action is properly made, where there was a common thread of a factual issue to be determined, namely, whether the deceased operator of an automobile was operating a borrowed vehicle within the geographical scope of the owner's permission.[3] Under Pennsylvania law, there is a presumption that an operator of a vehicle is operating the vehicle with the owner's permission unless rebutted by credible evidence.[4] The estate of the operator of the vehicle whose tortious driving resulted in several deaths and a serious injury was insolvent and the resolution of the dispute as to permission was necessary to elevate the various damage actions pending in Federal and State Courts above mere academic exercises.

The District Court was correct in entertaining the instant action under the Federal Declaratory Judgment Act as there was no other forum that could expeditiously and in a single action resolve this issue. The Declaratory Judgment action while brought by Petitioner, Provident Tradesmens Bank and Trust Company as administrator of the estate of Lynch was acquiesced in by the insurer and the other plaintiffs in various damage actions when joined at the behest of the insurer. The declaratory judgment action provided the economy of a single trial and avoided the spectre of inconsistent results.

Equity was the midwife of the concept of indispensable party, arising out of the passion of equity courts to do complete justice to all possible parties related to

3. There was a second issue as to who was operating the vehicle at the time of the accident. At the trial of the cause, however, the defendant insurer did not seriously dispute that Cionci was the operator.

4. *Exner v. Jafeco Ins. Co. of America*, 402 Pa. 473 (1961).

the controversy. *Gauss v. Kirk,* 198 F. 2d 83, 85, n. 2 (C. A. D. C. 1952); Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 347 (1957); Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254, et seq. (1961).

Though the concept was born of equity restraint, its transmigration into the law side provided the opportunity to some courts to endow it with a technical rigidity and a formula for jurisdictional ouster. Some courts began to speak of the failure to join an indispensable party as a jurisdictional defect or a denial of due process to the absent party. It became apparent that frequently the concept of indispensable party was utilized as a label to denote conclusions reached after weighing undisclosed equitable considerations. Wright, Federal Courts § 70 at 263 (1966 Ed.).

The Advisory Committee on Federal Rules of Civil Procedure dedicated itself to the task of reaffirming through a newly fashioned Rule 19 the procedural aspects of the concept; determining when it is feasible to join parties and setting forth clarifying standards for the lower courts for proceeding when joinder is not otherwise feasible. 39 F. R. D. 88 et seq.

The absence of the owner of the automobile did not preclude a judgment consistent with equity as between parties to the instant action. The record indicates that the interest of the named insured was contingent and highly remote. The cause of action against named insured was grounded in agency, whereas the evidence in its best light can sustain permissive use only. The cause of action against Dutcher, the named insured, has lain dormant in the state court for eight years.[5] Though the defense of Dutcher in that action is provided and directed by the defendant Lumbermens Mutual Casualty Company (R. 35, 36), no effort has been made to resolve the liability against

5. The pleadings in the Delaware County cases are included herein as an appendix to the brief.

Dutcher either by preliminary motions or a trial of the cause.

The owner of the vehicle, the named insured, not being a party to this action, his interest in the finite limits of the policy cannot be affected and he would stand to benefit by an active participation of the insurer in a defense on the merits as to the estate of the operator. Even though the majority of the Appellate Court regarded the owner as a person needed for a just adjudication, protective provisions in the judgment and the shaping of the relief afforded, could have been utilized in lieu of the dismissal of the action. In determining whether the owner of the vehicle is a person needed for just adjudication, it should be taken into consideration that the owner was afforded full opportunity to testify in the instant action and his testimony was rejected by the jury and by the court as not credible (R. 192, 193).

The implanting of a substantive label on the indispensable party concept and the creation of a substantive right where none existed before by the majority and the cloud that it casts upon the rulemaking power of this court marks a step backward in the design of the Federal Rules of Civil Procedure to provide for the "just, speedy and inexpensive determination of every action."

The Erroneous Labeling of the Indispensable Party Concept as a Substantive Right Improperly Attempts to Frustrate the Rulemaking Power of the Supreme Court to Establish Pragmatic Guidelines for Joinder of Parties for Just Adjudication.

The history of the murky rule of the indispensable party concept while said to stem from the landmark case of *Shields v. Barrow*,[6] has been shown by Professor Reed[7]

6. 17 How. (58 U. S.) 130, 15 L. Ed. 158.

7. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

to have had ample predecessors. These cases,[8] as in *Shields v. Barrow* were results of courts of equity expounding equity principles and evolved out of the judicial restraint normally shown by an equity court lacking the parties necessary to render effective justice. It was the thrust of the article by Professor Reed to expose the historical fallacy and delineate the problems which had flowed from the rigid and talisman approach that some courts had indulged in. The article emphasized the superior approach of the third circuit in *Kroese v. General Steel Castings Corporation,* 179 F. 2d 760 (3rd Cir., 1950), cert. den., 339 U. S. 983 (1950). In that case, Judge Goodrich was confronted with a factual circumstance in which Kroese, a New York resident, sued in the United States District Court in Pennsylvania to compel the payment of accumulated dividends on stock which he held in the defendant corporation, incorporated in Delaware but with its principal office in Pennsylvania. There were only three out of 12 directors susceptible to service in Pennsylvania. There was no one state or federal district in which a majority resided and no one would appear voluntarily to confer jurisdiction or venue. Without in personam jurisdiction over the directors, the district court held that it could not order the directors to pay the dividends.

The Court of Appeals reversed and fashioned a decree by which dividends were to be paid out from the sequestered assets of the defendant corporation and the court wisely pointed out that in personam jurisdiction was not needed where the discretion of the directors was no longer involved but that the dividends must be degorged as a matter of law.

There were further rebellions from a rigid and inflexible application of the indispensable party rule. An article written by Professor Hazard[9] further assailed the

8. *Russell v. Clarke's Executors,* 7 Cranch (11 U. S.) 69 (1812); *Mallow v. Hinde,* 12 Wheat. (25 U. S.) 193 (1827).

9. Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254 (1961).

indispensable party concept as a source of confusion and injustice, especially where it was held to have jurisdictional effect. Professor Hazard in conclusion deplored the tendency of some of the courts to apply the indispensable party rule without questioning its illogic and with indifference to the procedural consequences that flowed from its application. See *Fouke v. Scheneweek*, 197 F. 2d 234 (5th Cir., 1952). It is this mechanical application and seeming indifference to the result caused thereby that aroused the dissent in the instant case.

Judge Freedman deplored the mechanical application by the majority of the indispensable party rule:

> "From the earliest times courts have been guided in determining indispensability by practical considerations. The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label 'indispensable party' therefore has always been in truth more a statement of result than of cause, since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person." (Footnotes omitted.)

As the dissent pointed out, the interest of justice called strongly for the preservation of the jury verdict. The insurer, Lumbermens Mutual Casualty Company at no time ever raised the issue of Dutcher, the named insured and the owner of the vehicle, as an indispensable party.

The appellate court nevertheless made no inquiry as to the contingency or the remoteness of the interest of Dutcher, except to rely upon the facts upon which Dutcher was barred from testifying under the Pennsylvania Deadman's Rule. However, the Pennsylvania Deadman's Rule is a subjective standard in which contingency and remote-

ness have not the same limiting factor as in the concept of indispensable party.[10] Inasmuch as the insurer had resisted a disclosure of the limits of Dutcher's policy, it was necessary throughout the proceedings to deal with an abstract concept in order to express terms of interest. It is for this reason that the court below and the appellate court speak of finite limits. However, the insurer, Lumbermens, now discloses in its brief that Dutcher's policy has $100,000.00 limits.

The Appellate court ignored the testimony of the witnesses at the trial. Dutcher was the only survivor of the transaction in which his automobile was turned over to Cionci and Lynch. His testimony indicated, at best, limited permissive use. It is highly doubtful plaintiffs in the Delaware County cases in which Dutcher was a party could carry their burden of proof as to agency. The burden and elements of proof as to agency and coverage under permissive use clause are much different. In the latter case, there is a presumption that an operator of an automobile is driving with the owner's permission. Under Pennsylvania law, the presumption can only be dispelled by credible evidence and the issue of what is credible evidence must be submitted to the jury.[11]

Thus, it was possible in the instant case by establishing the lack of credibility on the part of Dutcher to permit the presumption to prevail. Similarly, as to the damage suits of the estates of the decedents in which Dutcher was incompetent to testify, the presumption similarly prevailed.

As to agency, however, it would be necessary for the parties so claiming to furnish affirmative credible evidence. This we submit by the record is not possible.

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10. See *Wright v. Wilson,* 154 F. 2d 616 (3rd Cir. 1946), for a history of the evolvement of the Pennsylvania Deadman's Statute.

Compare *Alcorne v. Cooke,* 101 Pa. 216 (1882) for the degree of remoteness which would render a witness incompetent to testify under the Deadman's Statute.

11. *Exner v. Jafeco Ins. Co. of America,* 402 Pa. 473 (1961).

It is significant in this regard that insurer Lumbermens in eight years has done nothing to resolve the liability of Dutcher either by preliminary motions or by ordering the case on to the trial list. It is further significant that the defense for Dutcher in those actions was provided and directed by the insurer Lumbermens. At any time during these eight years it was within the power of the insurer Lumbermens to dispel any trace or phantom of interest on the part of Dutcher, yet, it did not move to do so.

As Judge Freedman pointed out for the minority, Dutcher has not suffered by the instant action:

> "Dutcher not only will suffer no harm by his absence from the present action; he can gain nothing by being joined. Indeed Dutcher would probably consider adverse to his interest a requirement that he join. For he refrained from intervening under Rule 24 and thus is not bound by the judgment adverse to Lumbermens, even though he would have benefited had the judgment been in its favor. *Makariw v. Rinard, supra.*" (R. 820)

The dissent did not point out a further advantage to Dutcher. Had it been found that Cionci was not operating the vehicle under the permissive use clause, then a fortiorari, there could be no claim for damages against Dutcher in the Delaware County cases on the basis of agency, inasmuch as an adverse decision on permissive use requiring a lesser burden must preclude an action grounded upon agency.[12]

Should this action fail, it could require at least five more trials to resolve the issue which the jury herein has already resolved.[13] The preservation of the jury verdict

12. *American Auto Ins. Co. v. Fulcher* (4th Cir.), 201 F. 2d 751.

13. Separate suits might be required as in *Exner v. Jafeco Ins. Co. of America*, 402 Pa. 473 (1961). These suits could not be brought until judgments had first been secured against the Estate of Cionci.

in the instant case would undoubtedly effectively terminate all litigation. Applying practical principles the estate of Cionci is insolvent except for the insurance coverage sought in the instant case, considering the paucity of evidence against Dutcher, as a defendant, a tender of the policy limits must close this longstanding litigation.

The action of the majority of the Court of Appeals in dismissing this action was an expression of the rigid approach which the advisory committee to the Supreme Court on the Federal Rules of Civil Procedure had sought to avoid by evolving the amended Rule 19. The advisory committee in an unusually detailed explanation in its note catalogued the difficulties that the rule sought to rectify. The note showed the influence of the seminal work of Reed [14] and Hazard.[15] The need for laying to rest the so-called jurisdictional aspect of the indispensable party concept and to reiterate the pragmatic considerations by which a court could proceed notwithstanding the absence of a party were all demonstrated. The factors stressed in the note reveal the pertinent application of these factors to the instant case. In discussing the first factor, the note said:

> "The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat?" (citations omitted) 39 F. R. D. 92.

In applying this to the instant case, no review was made as to whether the absent party would be affected in

14. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

15. Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254 (1961).

a practical sense. Instead the appellate court rendered its decision upon a highly technical interest, if any. In addition, the possible collateral consequence of the judgment upon the insurer Lumbermens was as minimal as the gravamen of the action against Dutcher. Even assuming arguendo that there was such a threat to the insurer, Lumbermens, would they not lack consideration based upon equitable principles where they had not raised the issue of indispensable party, and where for eight years they have done nothing to resolve the interest of Dutcher?

The second pragmatic factor evolved by the advisory committee requires examination of the issues by which the prejudice if any may be averted or lessened by the so-called shaping of relief. This, in effect, was done by the trial court in the instant case when it deferred immediate payment of monies out of the fund until the resolution of the Delaware County cases. Thus, the shaping of relief not only decided a common crucial issue, but preserved the fund available until it could be expended following the determination of the various liabilities and damages.

Inasmuch as it was first revealed in Lumbermen's brief that the policy limits were $100,000.00, the Court could have given the various claimants an opportunity to restrict their demands to that amount. This procedure was followed in *Lumbermens Mutual Casualty Co. v. Elbert,* 348 U. S. 48, 52, 99 L. Ed. 59, 64. Had such opportunity been afforded or reafforded, this writer is authorized to state that the attorney representing the claimants other than the petitioner herein will restrict his claims to the unexpended portion of the policy limit, namely, $50,000.00. A decree so framed insulates Dutcher from any possible harm.

The third factor advanced by the advisory committee is whether an adequate judgment can be rendered in the absence of a given person. It is submitted that in the instant case, an adequate judgment was entered. It is submitted that the issue as to whether Cionci was operating

the automobile within the orbit of the permissive use clause was resolved. This factor which could not have been previously litigated was resolved in time so that the insurer Lumbermens could benefit by the finding and move to limit its liability by effectively contesting the damages in the remaining damage claims.

The fourth factor advanced by the advisory committee looks to the practical effect of a dismissal. The minority opinion points out that years of litigation in the federal courts would lapse into a futility (R. 258), whereas instead separate diverse suits would be required in the state court with possible inconsistent results. The majority opinion however sweeps all these pragmatic applications down the drain with a finding not supported in case law by finding that the indispensable party doctrine is not procedural but a declaration of substantive law, according a substantive right to a person to be joined as a party to an action when his interest or rights may be affected by its outcome (R. 228). No authority is given for this declaration of a substantive right, nor is any limitation placed upon the extent of the interest or right that may be affected by its outcome. Remoteness, contingency, major, minor, and scintilla are all swept up in the same general basket.[16] The consequence of this attempt by the majority to stamp a substantive label on the concept of indispensable party has a chilling effect on the purpose of new Rule 19 as pointed out by the dissent:

> "The majority, however, refuses to consider how the jury's verdict may be preserved and dismisses this as irrelevant because the defect is 'jurisdictional'. The

16. Though the court cites a footnote in *Stevens v. Loomis*, 334 F. 2d 775, 778, n. 7 (1st Cir., 1964), an examination of the footnote however indicates that Judge Aldrich has clearly misread the reason for the advisory committee's change in phrasing of Rule 19. The rewriting of Rule 19 was certainly not an admission by the advisory committee that the indispensable party concept is a matter of substantive law. See critical comment on Judge Aldrich's observation in *Kuchenig v. Calif. Co.*, 350 F. 2d 551, 556, n. 18 (5th Cir., 1955).

label bottles up all such considerations of practicality and equity. This lack of 'jurisdiction' the majority finds from standards for determining indispensability which it declares are 'substantive,' and so, under the Enabling Act (28 U. S. C. § 2072) cannot be affected by Rule 19. From this no conclusion can be drawn except a condemnation of the new Rule 19 as invalid. It is a consequence which I believe is unjustified and born of the mistaken, abstract conception of an artificial distinction between 'substantive' and 'procedural,' which would draw a narrow line to mark the permissible scope of the federal rules, contrary to the teaching of *Hanna v. Plumer,* 380 U. S. 460 (1965)." (R. 260, 261)

Norton v. United Gas Corp., 1 FRD 155, 162 (W. D. La. 1940) was a declaratory judgment action seeking a declaration and decree as to the rights and obligations of the parties respecting certain agreements and contracts. The issue of indispensable party was raised. The court found that the interest of the other possible plaintiffs was remote and contingent and fashioned a decree.

Again in *Texas v. City of New Orleans,* 159 F. 2d 77 (5th Cir., 1947), which was also a declaratory judgment action construing a contract, the court refused to recognize as indispensable parties those whose interest was remotely contingent.

In *Gauss v. Kirk,* 198 F. 2d 83 (D. C. 1952), an action was brought for a recovery of a deposit made with an agent towards the purchase of real estate. The vendor was deemed conditionally necessary, but not an indispensable party and the proceedings were permitted to continue without him. It is much like the instant case inasmuch as the court found that the vendor would not be bound by the instant action. Nevertheless, the court made inquiry as to the pragmatic considerations involved. The important considerations being that no judgment was sought which would

reach the funds or property of the vendor independent of the deposit itself. The circumstances of the case required the defendant broker to assert any meritorious defense. The judgment would not be res judicata as to the vendor. The court stressed the fact that the agent had made no effort to avoid the risk of double liability by seeking to interplead the parties or by depositing the fund with the court. Applying these pragmatic considerations it was held that the vendor did not fall within the indispensable party category. The court stressed the uncertain effect on the vendor of an adjudication between the parties. The frustration of the present suit was also considered. The conclusion was under all the circumstances that the litigation should go forward and that the vendor was not an indispensable party.

As was pointed out by the majority opinion, the *State of Washington v. United States*, 87 F. 2d 421 (9th Cir. 1936) is oft quoted as to its criteria in testing whether that party is indispensable. To the extent that it is designed to act as a mechanical jurisdictional guillotine or a quadruple stumbling block, it is contra to the more enlightened proposals. Indispensability is best determined by pragmatic considerations of the individual circumstances of a controversy. Certainly to the extent that the four-fold criteria sheds light on the areas inviting critical examination by the court it has some validity.

In *Benger Laboratories Limited v. R. K. Laros Company*, 24 F. R. D. 450 (E. D. Pa. 1959), Judge Van Dusen rejected an automatic approach to the indispensable party concepts even as to a patent assignee. The court refused to apply Rule of Civil Procedure 12(h) where a party with the necessary information to make a motion for the joinder of indispensable party did not do so and the only effect of the motion under the circumstances would be to protect that party and not the person alleged to be indispensable. In the opinion of the Court, such an interpretation violates the direction of Rule of Civil Procedure No. 1 that the rules

shall be construed to secure the just, speedy and inexpensive determination of every action. The analogy of that case to the instant case where the insurer, Lumbermen's effectively shielded the policy limits from discovery and has permitted the suits in Delaware County where the named insured is a defendant to remain dormant when the extent of the interest of the named assured could have long been resolved is compelling. In addition, the only beneficiary from the dismissal of the action is the insurer, Lumbermens. It gets an undeserved and unmerited second chance to litigate the scope of permission. Certainly the plaintiffs did not benefit by it for they have risked their all and a decision against them would not have only foreclosed insurance coverage but would have foreclosed any recovery whatsoever in the Delaware County suits. Dutcher does not benefit because he may now be forced to run the gauntlet of five separate court actions, which require his presence in court.[17] Consider *Parker Rust-Proof Co. v. Western Union Telegraph Co.*, 105 F. 2d 976, 2 Cir. 1939.

From the earliest times courts have been guided in determining indispensability by practical considerations. The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label "indispensable party" therefore has always been in truth more a statement of result than of cause, since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person.

17. That this is not a looked-for experience on behalf of Dutcher is revealed in the colloquy of counsel at p. 77.

The Declaratory Judgment Action Brought by the Estate of a Deceased Passenger to Determine Whether the Insolvent Estate of the Deceased Operator Is Insured Within the Terms of an Automobile Liability Policy, Absent Objections From Other Claimants or the Insurer, Is Within the Sound Discretion of the Trial Court.

The remedy of declaratory judgment in the Federal Court System is statutory.[18] It differs sharply from the Uniform Declaratory Judgment Act in that it does not contain the language of that act which relates to parties:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ."[19]

In addition, the Federal Act is explicit that an action for declaratory judgment will lie, notwithstanding the applicability of other remedies. This was reiterated in F. R. C. P. No. 57. The original committee note recognizes this important distinction:

> "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the proceeding. . . ."
>
> "When declaratory relief will not be effective in settling the controversy, the court may decline to grant

18. 28 U. S. C. A., 2201-2202.
19. 6 Moore's Federal Practice, 3007.

it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. . . ."[20]

The instant case differs only from the customary declaratory judgment action involving the problem of coverage,[21] in that it was on behalf of the victims against the insurer to determine whether or not the tortfeasor was an insured within the meaning of the omnibus or permissive use clause of an automobile liablity policy. The insurer did not contest the discretion of the court to entertain this action and instead filed a motion to require the action to include all claimants so that the determination of the effect of coverage would be binding upon all necessary parties.

The holding by the majority in the Court of Appeals is premised upon a mistaken assumption. The court assumes without basis that the pending suits in Delaware County would resolve the issue of insurance coverage. This is incorrect. First the personal representative of the Estate of Lynch is different from that of the Petitioner in the instant case. Moreover, the insurer is not a party and not only is the issue of coverage absent, but the naked question of insurance may not be raised. The mention of insurance is considered prejudicial and warrants the withdrawal of a juror except under highly exceptional circumstances.[22] Nor can the issue of coverage be resolved by implication for the action against Dutcher is grounded on agency. The burden of proof and the elements of proof as to agency are far more demanding than that required for establishing permissive use. A finding for the defendant, Dutcher, would still require another suit to determine whether or not Cionci was operating the vehicle under the permissive use clause. In addition, a finding for the Estate

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20. 6 Moore's Federal Practice, 3003.

21. *Glens Falls Indemnity Co. v. Fredericksen,* 8 F. R. D. 55 (D. C. Neb. 1947); *Northwest Cas. Co. v. Kirkman,* 119 F. Supp. 828 (D. C. N. C. 1954).

22. *Fleischman v. Reading,* 388 Pa. 183.

of Lynch would resolve nothing. The issue of coverage would have to await a separate garnishment action after a judgment for damages had been achieved against one or more of the defendants, which under the facts of this case would undoubtedly be the Estate of Cionci.

Professor Borchard in his monumental volume, Declaratory Judgments (2d Ed. 1941), at p. 299, set forth the principal criteria for exercising this discretion:

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."

It is not necessary that the entire litigation be settled by the declaratory judgment proceeding, but it will suffice if an important issue is resolved as Professor Borchard points out at p. 298:

> "In connection with the maxim that the discretion will be favorably exercised when the judgment will 'terminate the controversy giving rise to the proceedings,' the question has arisen whether the whole controversy of which the submitted issue is a part, must be settled, or whether only the narrow point in issue need be conclusively adjudicated. The answer is that only the narrow point in issue must be decided, although the presumption is that this point will settle some autonomous and independent issue of inherent importance, even should it not dispose of the entire litigation. For example, the petition of an insurance company that is by the facts exempted under the policy from the obligation to defend the insured or pay a judgment found against him does not go to the root of the whole litigation, especially the personal injury suit,

but it does decide the exoneration or duty to defend of one important party and thus presents a segregable independent autonomous issue which may be litigated to judgment."

Even assuming, arguendo, that Dutcher was a necessary party, this defect, if any, was obviated, when Dutcher was not only present but had an opportunity to be heard on the important question as to the scope of permission. This, Borchard indicates, is a proper alternative to the joining of a necessary party in interest and his being bound thereby.

At page 299, Borchard, in discussing when discretion is proper to hear a declaratory judgment action relating to an insurance contract, stated:

> "The discretion to refuse to exercise federal declaratory jurisdiction is properly applied when a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest; when it is sought to foreclose the rights of absent injured parties by an uncontested suit by insurer against the insured, in which the insured connives with the insurer or supplies the evidence to enable him to establish 'no coverage' or to decide crucial issues of fact by default; where the declaratory procedure is used for procedural fencing to enable the company to defeat a natural state jurisdiction."

None of these criteria are present in the instant case. On the contrary, this action eliminates this factor from multiple suits. There was no connivance or collusion in the instant case. On the contrary, the insurer resisted the plaintiffs strenuously. There was a full rapport between the insurer and Dutcher and Dutcher was willing and available in support of the insurer and did in fact testify for the insurer when permitted.

The cases cited by the majority opinion in support of the contention that the lower court erred in exercising its

discretion to hear the instant case provide little guidance. *A. L. Mechling Barge Lines, Inc. v. United States,* 368 U. S. 324 (1961) revolves around the question as to whether the issue is moot because the practice complained of was still evolving. It was primarily a suit attempting to establish a federal question in a dispute with the Interstate Commerce Commission. *Public Service Commission of Utah v. Wicoff Company, Inc.,* 344 U. S. 234, 241 (1952), relates to the delicate interplay between Federal Courts and state regulatory commissions and bears no relationship to the instant case except in the most general language. *Doby v. Brown,* 232 F. 2d 504 (4 Cir. 1956), relates to an absence of a federal question. *Aetna Casualty & Surety Company v. Quarles,* 92 F. 2d 321 (4 Cir. 1937), while cited by the majority opinion, affords little solace for their position. The Court in that case in refusing to exercise its discretion said:

> "As pointed out in a recent article (American Bar Association Journal, vol. XXIII, p. 553 et seq.), *the remedy prescribed by the Declaratory Judgment Act may furnish a convenient and appropriate remedy for use in many cases where a controversy has arisen over the coverage of an automobile liability insurance policy;* but the question in the case at bar relates not to the coverage of the policy but to the bona fides of a suit which had been instituted against the insured and which the company had been called upon to defend." (Emphasis supplied.) (page 325)

In *Brillhart v. Excess Insurance Company of America,* 316 U. S. 491, 86 L. Ed. 1620 (1942), the majority opinion utilized the general language of *Brillhart.* However, an examination of that case reveals that the opinion of this court precludes snap judgments by the appellate court as to whether discretion is or is not properly exercised. In the *Brillhart* case, the Court of Appeals without analysis, decided that the District Court had discretion to examine

the action despite the fact that the issues involved were identical to a case then pending in the State Court and in direct conflict with the principle that when another proceeding is pending in the suit in which all the matters in controversy between the parties can be fully adjudicated a declaratory judgment in the federal court is unwarranted.

This court required an examination into the actions pending in the state court litigation to determine whether or not such a conflict is in fact existing. This court set forth the standards of inquiry:

> ". . . This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, where necessary parties have been joined, whether such parties are amenable to process in that proceeding, . . ." (Page U. S. 495, L. Ed. 1625)

No such inquiry was made in the instant case. The language of the majority opinion clearly indicates their mistaken appraisal of the status of the state court actions.

On the other hand, the determination of the issue of permissive use has been repeatedly found to be a proper basis for the exercise of discretion in entertaining a declaratory judgment action. In *Nationwide Mutual Insurance Company v. Simms,* 231 F. Supp. 787 (D. Md. 1964), the court held under similar circumstances as the instant case except that the action had been brought by the insurer rather than one of the claimants that ". . . the injured defendants' contention is that the issue of permissive use presented in this court is entirely different from the issue of agency presented in the pending suits in the state court; different parties are involved; different parties carry the burden of proof and different elements of proof are required to prevail" (page 790).

See also *American Auto Insurance Company v. Fulcher*, 4 Cir. 1953, 201 F. 2d 751. See also *Northwestern Casualty Company v. Krikman*, N. D. N. C. 1954, 119 F. Supp. 828.

It has never been a bar to efficient use of declaratory judgment actions for determining coverage of automobile liability policies that there was then pending an action by the claimant against parties other than the insurer.[23] The result should not be any different where the claimants are the plaintiffs to an action. The present action has the merit of avoiding any conflict of interest on the part of the insurer. *Stout v. Grain Dealers Mutual Ins. Co.*, 307 F. 2d 521 (4th Cir., 1962).

Examining the broad perimeter of the facts of the instant case, the declaratory action herein posed singular economy. There was no purpose under the facts of the accident in proceeding against any other defendant than the estate of Cionci. Whatever may have been in the pleaders' minds in the other cases as to possible other defendants, the paucity of the evidence lent no hope of gain. To spin the wheels of justice needlessly was avoided by determining the pertinent and practical fact as to whether the sole tort feasor was to be afforded coverage and the fund available to compensate his victims.

CONCLUSION.

A rigid application of the indispensable party doctrine should not have been resurrected by the majority opinion in the Court of Appeals, especially in the light of the recent amendment to Federal Rule of Civil Procedure 19. It is erroneous for the majority to place the mantle of substantive law on this concept so as to insulate it from the prag-

23. *Ohio Casualty Ins. Co. v. Maloney*, 44 F. Supp. 312 (1942); *Associated Indemnity Corporation v. Garrow Co., Inc., et al.*, 125 F. 2d 462 (2d Cir., 1942); *Northwest Cas. Co. v. Kirkman*, 119 F. Supp. 828 (D. C. N. C. 1954); *Franklin Life Ins. Co. v. Johnson*, 157 F. 2d 653 (10th Cir., 1946).

matic determination required by Rule 19, which in itself marked the culmination of a determined effort by legal scholars to correct an inequity in the law. The decision of the majority if permitted to stand places a cloud of invalidity on the salutory amendment to Rule 19.

The majority opinion would sharply curtail and emasculate the discretion of the trial courts to entertain declaratory judgment actions, whereas in the instant case none of the possible parties objected to the proceedings, and where a determination that there was no coverage would have effectively terminated all litigation as futile.

Respectfully submitted,

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APPENDIX A.

IN THE

COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

No. 1048.

DECEMBER TERM 1959.

IN TRESPASS.

JOHN L. HARRIS

v.

EDWARD S. DUTCHER, WILBERT M. MASSEY, ADMINISTRATOR D. B. N. OF THE ESTATE OF JOHN R. LYNCH, ALSO KNOWN AS JOHN ROBERTS LYNCH, DECEASED, AND GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED.

Amended Complaint.

The Plaintiff, John L. Harris, brings this action in Trespass and complains and says:

1. The Plaintiff is an individual, over twenty-one (21) years of age, and resides at 725 Miller Street, Bryn Mawr, Pennsylvania.

2. The Defendant, Edward S. Dutcher, is an individual, residing at 901 Railroad Avenue, Bryn Mawr, Radnor Township, Delaware County, Pennsylvania, and was on or about January 17, 1958, the owner of a certain 1955 Mercury Sedan automobile.

3. The Defendant, Wilbert M. Massey, is the administrator D. B. N. of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased, letters having been duly issued by the Register of Wills.

4. The Defendant, George H. Patterson, is the administrator of the estate of Donald Cionci, deceased, letters having been issued by the Register of Wills.

5. On or about January 17, 1958 at or about 4:30 o'clock P. M., Defendant, Edward S. Dutcher, was the owner of a 1955 Mercury automobile which was in charge of decedent, John R. Lynch, who was acting as the agent, servant and/or employee of Edward S. Dutcher in the scope and course of his agency or employment.

6. At the time aforesaid decedent, Donald Cionci, was driving the automobile of Edward S. Dutcher with the permission of and under the supervision, direction and control of John R. Lynch who was at the time the agent, servant, and/or employee of Edward S. Dutcher and acting within the scope and course of his employment, both acting in furtherance of the business of Edward S. Dutcher.

7. At the time aforesaid, the Plaintiff was an invited guest and passenger sitting in the rear seat of the automobile of Edward S. Dutcher and had no part or duty in the operation or control of said automobile.

8. At or about the time aforesaid, Donald Cionci was operating the automobile of Edward S. Dutcher on the business of Edward S. Dutcher, in a southerly direction on Bryn Mawr Avenue in Bryn Mawr, Delaware County, Pennsylvania, in a negligent, reckless, wilful and wanton manner.

9. That at the time and place aforesaid, Donald Cionci directed the course of said Mercury automobile across the center line of Bryn Mawr Avenue into the north bound lane of traffic at a high and dangerous rate of speed and

drove said Mercury automobile head-on into a Chevrolet pick-up truck being carefully driven by Thomas W. Smith in a northerly direction on Bryn Mawr Avenue.

10. The violent collision practically demolished the Mercury automobile of Edward S. Dutcher and as a result Plaintiff sustained injuries to various parts of his body to wit: comminuted fracture at distal end of left femur involving the knee joint; concussion; lacerations to various parts of his body and severe shock to his nervous system, all of which caused him great pain, agony, loss of sleep and inconvenience and in the future will probably cause him great pain, agony, loss of sleep and inconvenience and prevent him from attending his daily occupation.

11. As a result of the injuries sustained, the Plaintiff was obliged and in the future will be obliged to incur expenses in various sums of money for x-rays, medical attention, hospitalization, braces, appliances and therapy treatments in and about endeavoring to treat and cure himself to his great financial damage and loss. Expenses to date are as follows:

Hans W. Christopher, Inc., (leg brace)	$ 90.00
Dr. Gilman E. Heggestad, M. D.	450.00
Bryn Mawr Hospital	2,701.94
Bryn Mawr Hospital (Out-patient care)	50.00

12. Plaintiff avers that as a result of the injuries sustained he has suffered a permanent disability and is unable to perform the work he was performing prior to the accident.

13. By reason of the injuries sustained, Plaintiff was prevented from following his usual occupation as a laborer for James Barone, where he earned One Dollar and Forty Cents ($1.40) an hour thus suffering a loss of income; having been unable to perform any work from the date of the accident (January 17, 1958) to

14. The said collision and resulting injuries to the Plaintiff were caused solely and only by reason of the recklessness, carelessness and negligence of Edward S. Dutcher, Donald Cionci and John R. Lynch, inter alia, as follows:

(a) In operating said automobile at a high and excessive rate of speed, dangerous under the circumstances;

(b) In failing to have said automobile under proper and sufficient control so as to be able to stop it, if need be, to avoid such collision;

(c) In operating said automobile with defective brakes;

(d) In failing to use due care under the circumstances; and

(e) In failing to comply with the provisions of the Acts of Assembly and local Ordiances in such cases made and provided.

15. The Plaintiff was in no way negligent nor contributed to the aforesaid collision and injuries which he suffered.

WHEREFORE, Plaintiff, John L. Harris, demands judgment against the defendants in a sum in excess of Twenty Thousand ($20,000) Dollars, together with interest from January 17, 1958.

Attorneys for Plaintiff.

APPENDIX B.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

No. 1047.

DECEMBER TERM 1959.

IN TRESPASS

SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, DECEASED,

v.

EDWARD S. DUTCHER, WILBERT M. MASSEY, ADMINISTRATOR N. B. N. OF THE ESTATE OF JOHN R. LYNCH, ALSO KNOWN AS JOHN ROBERTS LYNCH, DECEASED, and GEORGE M. PATTERSON ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED.

AMENDED COMPLAINT.

The Plaintiff, Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, brings this action and complains and says:

1. Plaintiff, Sarah B. Smith, is the widow of the decedent, Thomas W. Smith, and Administratrix of the Estate of Thomas W. Smith, deceased, Letters of Administration having been issued to her by the Register of wills of Delaware County, Pennsylvania, on December 14, 1959.

2. Plaintiff brings this action on behalf of the Estate of Thomas W. Smith, Deceased, under and by virtue of the "Survival Actions" of the Commonwealth of Pennsylvania.

3. The Defendant, Edward S. Dutcher, is an individual residing at 901 Railroad Avenue, Bryn Mawr, Radnor Township, Delaware County, Pennsylvania, and was on or about January 17, 1958, the owner of a certain 1955 Mercury Sedan automobile.

4. The Defendant, Wilbert M. Massey is the administrator D. B. N. of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased, letters having been issued by the Register of Wills.

5. The Defendant, George M. Patterson is the administrator of the Estate of Donald Cionci, deceased, letters having been issued by the Register of Wills.

6. The decedent, Thomas W. Smith, was the owner and operator of a certain 1955 Chevrolet pick-up truck which he operated on or about January 17, 1958, at or about 4:30 o'clock P.M., in a northerly direction on Bryn Mawr Avenue, Bryn Mawr, Delaware County, Pennsylvania.

7. At the time aforesaid, decedent, John R. Lynch, was in charge of the Automobile of Edward S. Dutcher as the agent, servant and/or employee of Edward S. Dutcher acting within the course and scope of his employment.

8. At the time aforesaid, decedent, Donald Cionci, was driving the automobile of said Edward S. Dutcher with the permission of and under the supervision, direction and control of John R. Lynch who was at the time the agent, servant and/or employee of Edward S. Dutcher and acting within the scope and course of his employment, both acting in furtherence of the business of Edward S. Dutcher.

9. At the time and place aforesaid, Donald Cionci operated the automobile of Edward S. Dutcher, on the business of said Edward S. Dutcher, in a southerly direc-

tion on said Bryn Mawr Avenue, in a negligent, reckless, wilful and wanton manner.

10. While both automobiles were proceeding in opposite directions, Donald Cionci operating the automobile of Edward S. Dutcher, under the supervision, direction and control of John R. Lynch and while on the business of Edward S. Dutcher, negligently and carelessly and at a high and dangerous rate of speed crossed the center of the street into the northbound traffic lane and drove said automobile head-on into the Chevrolet pickup truck which was at the time being operated by Thomas W. Smith in a careful and lawful manner, causing Thomas W. Smith to sustain serious injuries which injuries caused his death a few days later.

11. The said collision and injuries to the decedent, Thomas W. Smith, were caused solely and only by reason of the recklessness, carelessness and negligence of the defendants as follows:

(a) In operating said automobile at a high and excessive rate of speed, dangerous under the circumstances;

(b) In failing to have said automobile under proper and sufficient control, so as to be able to stop it if need be, to avoid such collision:

(b) In deliberately crossing the street into the path of the truck coming in the opposite direction and running head-on into plaintiff's truck;

(d) In failing to use due care under the circumstances;

(e) In acting in a gross disregard of the safety of others;

(f) In failing to comply with the Acts of Assembly and Local Ordinances in such case made and provided, and

(g) In otherwise failing to regard the rights of the decedent Thomas W. Smith.

12. The decedent, Thomas W. Smith, was not negligent, nor did he in any way contribute to the accident.

13. That at the time of the accident, Thomas W. Smith, was employed as a road foreman by Lower Merion Township earning approximately Four Thousand Five Hundred ($4,500.00) Dollars a year.

14. That the expenses incurred for medical attention and burial of Thomas W. Smith are as follows:

Bryn Mawr Hospital	$ 266.60
Handy B. Beckett (funeral expenses)	1105.00
Rolling Green Memorial Park, Inc. (Bronze Memorial)	221.56

15. That as a result of the aforementioned collision the Chevrolet truck of Thomas W. Smith was damaged, broken and bent in and about the front, motor chassis and left side to such an extent that it could not be repaired in a proper manner and therefore Thomas W. Smith suffered a loss in the value of said truck in the sum of Five Hundred Fifty ($550.00) Dollars, said truck being valued at Six Hundred Fifty ($650.00) Dollars just before the accident and having a salvage value of One Hundred ($100.00) Dollars after the accident.

16. The Plaintiff claims on behalf of the Estate of Thomas W. Smith, Deceased, the damages suffered by Thomas W. Smith and his estate as well as the pain and suffering Thomas W. Smith underwent prior to his death.

WHEREFORE, Plaintiff demands judgment against the Defendants in a sum in excess of Five Thousand ($5000.00) Dollars together with interest from January 17, 1958.

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Attorneys for Plaintiff.

APPENDIX C.

Federal Declaratory Judgment Act.

CHAPTER 151—DECLARATORY JUDGMENTS

* * *

§ 2201. CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85—508, § 12(p), 72 Stat. 349.

* * *

Federal Rules of Civil Procedure.

Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii)

leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any person as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

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